

WISHA REGIONAL DIRECTIVE

Department of Labor and Industries

Division of Occupational Safety and Health

2.05 Initiating Inspections & Closing Conferences

Date Issued: May 9, 2006

I. Background

Most Washington employers are subject to Title 49.17 RCW, the Washington Industrial Safety and Health Act (WISHA). RCW 49.17.050(6) requires the Department to "provide for the frequency, method, and manner of the making of inspections of work places without advance notice." RCW 49.17.070 authorizes DOSH enforcement staff, "upon presentation of appropriate credentials to the owner, manager, operator, or on-site person in charge" of the work site, "to enter without delay and at all reasonable times the factory, plant, establishment, construction site, or other area, work place, or environment where work is performed by an employee of an employer." This statute also authorizes DOSH enforcement staff "to inspect, survey and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such work place and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein...."

Under the federal and state constitutions, a court-issued warrant may be necessary in order to conduct a particular DOSH inspection. Whether a warrant is required depends on the specific circumstances of the inspection. The DOSH Compliance Manual does not and cannot address every possible situation. Therefore, it follows the same general approach as that taken by federal OSHA's Field Inspection Reference Manual, indicating that "Unless the circumstances constitute a recognized exception to the warrant requirement (e.g, consent, third party consent, plain view, open field, or exigent circumstances) an employer has a right to require that the CSHO seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant." (DOSH Compliance Manual, III.A.4).¹

¹ Some of these examples are not actual "exceptions" to the warrant requirement. Rather, they are instances when a warrant simply is not required. For simplicity the Compliance Manual and this WISHA Regional Directive combine inspections that do not trigger the warrant requirement and those that trigger the requirement but for which an exception exists into a single group of "exceptions."

L&I have developed policies regarding entry, warrants, consent and related issues as they arise in the field. These policies generally exceed the requirements of applicable law. Thus, L&I policy may direct field staff to seek a warrant even where one is not required by law.

Upon completion of a DOSH compliance inspection, enforcement staff shall conduct a face-to-face closing conference with employer and employee representatives to discuss any hazards that were identified during the walk-around inspection, citations that are being considered and reasonable abatement dates for citations that may be issued. Under certain circumstances a CSHO may close an inspection by phone after getting permission from the Regional Compliance Manager. Various informational forms for the employer and employee representatives have been developed for enforcement staff to use during the closing conference. These forms, often called "Closing Conference Highlights," cover topics including the nature of the proposed violations, abatement dates and the rights and duties of the employer.

DOSH policy requires all citations be reviewed and approved by the supervisor prior to issuance. In some cases, inspection findings require the review by staff from DOSH Operations and other regional representatives prior to citation issuance. This policy has been written to ensure consistency regarding when and how information will be provided to an employer at a closing conference.

II. Scope and Application

This WISHA Regional Directive (WRD) provides guidance to DOSH enforcement staff initiating inspections for any reason. It supplements the policies found in the DOSH Compliance Manual and replaces all other instructions on this issue, whether formal or informal; This WRD will remain in effect until its substance can be incorporated into the Compliance Manual.

III. Compliance and Consultation Protocols

A. *How should DOSH enforcement staff confirm consent when initiating an inspection?*

1. The inspector must enter the worksite at an entry point designated by the employer to request the consent described in this section. If the employer has not designated an entry point, then the inspector shall enter at a reasonably recognizable entry point. The inspector shall make a good faith effort to determine whether there is an employer designated entry point prior to entering at a recognizable entry point. In the event an inspector cannot identify an entry point designated by an employer, the inspector shall document the efforts he/she made to identify the employer-designated entry point and the reasons he/she believed the point of entry constituted a "reasonably recognizable entry point."
2. When a DOSH inspector enters or approaches a worksite, he or she will identify the owner, manager, operator, or his or her on-site person in charge of the worksite. (See Chapter III-A.3. of the WISHA Compliance Manual). The inspector shall use the following to identify him-/herself and to request consent to perform the inspection:

“My name is _____. I am an inspector for the State of Washington Department of Labor and Industries. I am here to conduct a health and or workplace safety (select one) inspection. [The inspector will show his/her credentials, as appropriate.] May I have your permission/consent [select one] to perform the inspection?”

If the owner, manager, operator, or on-site person in charge of the worksite says “Yes,” the inspector may proceed with the inspection. If, and only if, the owner, manager, operator, or on-site person in charge of the worksite does not affirmatively respond to the above request for consent to perform the inspection, the inspector will then state:

“Thank you. The State may seek a warrant for entry upon and inspection of the premises from a court of competent jurisdiction and such a warrant may be issued to permit me to conduct the inspection.”

Using complete and accurate quotations, the inspector will document the question and the employer’s response in the inspection work notes.

3. If the inspector obtains consent or permission to perform the inspection, the inspector will inform that individual of the purpose of the inspection, as well as the reason this work site has been selected for inspection. For example, the inspector might advise the representative, “I am here because I saw an individual on the roof that is not using fall protection.”

B. How should DOSH enforcement staff handle a refusal to permit the inspection?

As indicated in the DOSH Compliance Manual, DOSH staff will leave the premises to confer with the CSHO supervisor if the employer’s representative refuses to permit entry. Inspectors must avoid any arguments regarding refusal. They must not threaten or attempt to intimidate the employer. Because such intimidation or perceived intimidation may be the result of tone or demeanor, DOSH staff will avoid any activity that could be construed as threatening, such as raising their voices or using a threatening tone or body language.

In addition to other guidance in the Manual, staff is expected to comply with the following:

1. If asked about DOSH’s authority to conduct inspections, the inspector will explain that Washington law gives the Department the right to conduct unannounced inspections. The inspector must also mention that Department policy allows the employer to insist upon a warrant. This guidance applies even in those cases where the warrant is not strictly required.
2. If asked what will happen next or whether DOSH will pursue a warrant, the inspector will indicate that a warrant to conduct the inspection may be sought. The inspector will not make a definite statement that the warrant will be granted

or even that one will be sought, such as, “If you make me, I’ll get a warrant” or “I know I can get a warrant.”

3. If asked whether a warrant request will be successful, the inspector will indicate that it is the court’s decision but, DOSH is often able to obtain warrants when requested. Again, the inspector will avoid any definite statement that a warrant will be sought or granted, but the inspector can say, for example, “If we decide to request a warrant, we will present our case to a judge, and the judge will decide whether to grant the Department the warrant.”
4. Under no circumstances may the inspector suggest in any way that the employer will be penalized for having asked the inspector to obtain a warrant. If the employer raises the issue (for example, by saying something such as, “Well, sure I can make you get a warrant, but then you’ll just come back here with an attitude”), the inspector will make clear that there will be no such result (for example, by responding, “You are allowed to request a warrant, and I have no problem with you doing so. If I come back with a warrant, I’ll do a thorough inspection, just like I would if you let me in right now”).

The inspector should ask for all relevant information related to the denial of entry, for example, the name and title of the person who has refused to give consent. The inspector will record this information in the inspection work notes, normally on the back of the opening conference checklist (requiring them to document this on back of WISHA 1a? There is a blank for it just to the right of the opening checklist).

C. How should DOSH staff handle situations where it is necessary to enter the property to make contact with the agent in charge?

1. In the absence of any type of “No Trespassing” sign, DOSH staff may enter an active worksite during normal working hours at an entry point designated by the employer for the purpose of making contact with the agent in charge and seeking consent to perform the inspection. If the employer has not designated an entry point, then the inspector shall enter at a reasonably recognizable entry point. The inspector shall make a good faith effort to determine whether there is an employer designated entry point prior to entering at a recognizable entry point. In the event an inspector cannot identify an entry point designated by an employer, the inspector shall document the efforts he/she made to identify the employer-designated entry point and the reasons he/she believed the point of entry constituted a “reasonably recognizable entry point.” If possible, DOSH staff will initiate contact prior to entering any portion of the worksite.
2. If the property is posted with a “No Trespassing” sign (whether directed to the general public, to DOSH, to L&I or to government agents in general), the sign will not by itself be considered a denial of entry.

Whenever he or she encounters such a “No Trespassing” sign, the inspector will record any relevant observations both in writing and by photograph (including a

description of the property, any apparent violations and any visible activity) from outside the property. The inspector may then enter the property consistent with the directions set forth above for the purpose of making contact with the agent in charge and obtaining consent to perform the inspection if, in his or her judgment, it is reasonably safe to do so and at least one of the following conditions is true:

- a. When the inspector has actual knowledge, based on past experience with the employer, that the employer does not intend the sign in question to constitute a denial of entry to DOSH inspectors.
 - b. When contact can be made with the employer or an employer representative on the site and unambiguous consent to enter can be obtained before crossing the property line.
 - c. When the sign obviously is not intended to exclude DOSH inspectors from the property (for example, a sign reading “Members Only” at a country club).
 - d. When an apparent violation constituting imminent danger is observed and the inspector must enter the site to have the violation immediately corrected (or to issue an order of immediate restraint).
3. In all circumstances not covered by III(C)(2)(a) – (c) above, the inspector will contact his or her supervisor or other person with suitable authority before entering property marked with a no trespassing sign. These circumstances include but are not limited to:
- a. When it is not clear whether the sign is intended to exclude DOSH inspectors or not, the inspector will contact his or her supervisor to determine whether or not to enter the property or take other action.
 - b. When any other circumstances exist that make it unclear whether or not entry onto the property may pose a hazard to the inspector’s safety, the inspector will contact his or her supervisor before entering the property.

D. Who will make decisions whether to obtain a warrant to continue the inspection when entry has been denied?

Before requesting a warrant, the CSHO supervisor and regional compliance manager will consult with the DOSH Compliance Operations Manager or Statewide Compliance Administrator. In the event that it is not possible to immediately contact one of these individuals, the Regional Compliance Manager may choose to pursue a warrant as circumstances dictate.

E. What should all CSHO’S cover during an opening conference?

Each CSHO will cover thoroughly each item on the opening conference checklist. The CSHO should also explain the purpose of the walk-around and suggest that the employer and employee representative take notes to aid in the inspection process, closing conference and abatement of any hazards found during the walk-around. The

CSHO should also encourage the employer to ask questions about hazard recognition, code application, and how to implement safety code requirements.

F. Can I provide the employer with a Closing Conference Highlights form during the Inspection?

Routine inspections: A routine inspection is defined as any inspection that is not listed on the significant events log and all inspections that do not require a DOSH Compliance Operations review.

The attached Closing Conference Highlights form (appendix A) may be used at the conclusion of a routine inspection. The form must always be identified as “**proposed violations**” and the compliance officer must inform the employer and employee representatives that the inspection findings are subject to further review. If there are any changes resulting from the review of the inspection findings, enforcement staff shall attempt to call the employer and notify them of the changes.

Non-Routine Inspections: These are defined as inspections listed on the significant events log or inspections which require DOSH Operations, Compliance Operations, or AGO review prior to citation issuance.

No closing conference shall be conducted with the employer or employee representatives on these types of inspections until regional staff and DOSH Compliance Operations staff have completed the final review. The decision on how to handle the closing conference will be made during the final review meeting.

G. Can I create my own Closing Conference Highlights form?

No. In order to standardize the process of providing written information to an employer and employee representatives at the closing conference, the attached Closing Conference Highlights form is the only one approved for use.

Approved: _____
Stephen M. Cant, CIH, Assistant Director
Department of Labor and Industries
Division of Occupational Safety and Health